IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1951.

No. .....

AUTO TRANSPORTS, INC., and GENERAL MOTORS CORPORATION,
Appellants,

v.

UNITED STATES OF AMERICA and the INTERSTATE COMMERCE COMMISSION,
Appellees.

BRIEF OF APPELLANTS IN OPPOSITION TO MOTION TO AFFIRM.

OPINION BELOW.

The opinions of the specially constituted United States District Court for the Western District of Oklahoma in Civil Action No. 5009, both majority and minority, are reported in **Auto Transports v. United States**, 101 F. Supp. 132. The majority opinion sustains an order of the Interstate Commerce Commission designed to require appellant, Auto Transports, Inc., to suspend operations as a contract

carrier by motor vehicle for failure to comply with the Commission's interpretation of the rate provisions, Part II of the Interstate Commerce Act (Title 49, U. S. C. 301, et seq.).

JURISDICTION.

Statutes believed to sustain the appellate jurisdiction are as follows: U. S. Code, Title 28, Sections 1253, 1336, 2321 and 2325. These sections are set forth in full in the jurisdictional statement.

QUESTION PRESENTED.

Whether Title 49, U. S. C., Section 318 (a),[1] requires appellant, Auto Transports, Inc., to file with the Interstate Commerce Commission as a schedule of minimum rates or charges the actual contract charges contained in its current contract with appellant, General Motors Corporation, which contract is required to be filed with the Interstate Commerce Commission under the provisions of Title 49, U. S. C., Section 320 (a).

STATUTES AND REGULATIONS INVOLVED.

Among other things, the Interstate Commerce Act (Title 49, U. S. C.) regulates the operations in interstate or foreign commerce of motor carriers engaged in the transportation of property for compensation. This statute separately defines common carriers by motor vehicle and contract carriers by motor vehicle. Section 303 (14) defined the term "common carrier by motor vehicle" in this act to mean "any person who holds itself out to the gen-

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1 Title 49 is the Interstate Commerce Act, as amended. Part II of the Interstate Commerce Act governs the operation of motor carriers and the sections therein are numbered in the 200 series. In this brief, however, appellants will use the 300 series which is in accordance with the United States Code numbering system.

eral public to engage in the transportation by motor vehicle . . . of property . . . for compensation" (Title 49, U. S. C.).

Section 303 (15) defines a contract carrier in the following language:

> "The term 'contract carrier by motor vehicle' means any person which, under individual contracts or agreements, engages in the transportation [other than transportation referred to in paragraph (14) and the exception therein] by motor vehicle of passengers or property in interstate or foreign commerce for compensation."

Appellant, Auto Transports, Inc., is a contract motor carrier and is authorized to do business under a permit issued by the Commission pursuant to the provisions of Section 309 of the Act.[2]

Among the necessary requirements in the case of a contract motor carrier is that it file with the Commission, publish and keep open for inspection, a "schedule of minimum rates and charges actually maintained and charged" [Sec. 318 (a)]. This section further provides that no reduction may be made by the contract carrier in its schedule of minimum rates and charges except in accordance with the procedure specifically described in the section. This procedure requires a delay of thirty days before a new schedule may become effective, subject, however, to the right of the Commission to suspend the schedule for a period not to exceed seven months. The section further provides that a contract carrier shall not charge a shipper under its contract less compensation for transportation service than would be provided for in the schedule of mini-

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2 Section 309 authorizes the Commission to issue permits to contract carriers if the operation proposed is consistent with the public interest and the National Transportation Policy, and appellant, therefore, is qualified; this section is not involved.

mum rates and charges. Section 318 (a) is set forth in full in Appendix A.

Section 320 (a) of the Act authorizes the Commission to require contract motor carriers to file with it copies of contracts. This section requires that such contracts must conform to the requirements of Section 318 (a). The provisions of Section 320 (a) are set forth in Appendix B.

The Commission has promulgated certain regulations relative to the filing of schedules of minimum rates and charges and the filing of the contracts. The regulation on the filing of schedules is practically a restatement of the statutory requirements except that in the case of the regulation the Commission requires "all" changes in schedules to be filed on statutory notice. These particular regulations are contained in the Code of Federal Regulations, Title 49, Section 187.0-187.10, and shown in part in Appendix C.

The Commission's regulations relative to the filing of contracts is found in the Code of Federal Regulations, Title 49, Section 173.1 through 173.6. This regulation requires that a contract between a shipper and a carrier must be bilateral and impose specific obligations upon both shipper and carrier and that it shall cover a series of shipments during a stated period of time in contrast to contracts of carriage covering individual shipments which is the case when a shipper utilizes the services of a common carrier. These regulatory provisions, to the extent here important, are set forth in Appendix D.

Section 318 (b) of the Act empowers the Commission to prescribe minimum rates and charges of contract carriers after proper investigation. The provisions of this section of the statute are set forth in Appendix E.

STATEMENT.

Appellant Auto Transports, Inc., of Oklahoma City, Oklahoma, is a contract carrier by motor vehicle authorized to perform a transportation service in the delivery of new automobiles from Wyandotte County, Kansas, to points in 15 states.[3] Appellant General Motors Corporation produces new automobiles at a point in Kansas City, Wyandotte County, Kansas, and engages the service of appellant Auto Transports, Inc., to deliver the new automobiles in the authorized territory. The production activities of this plant commenced during the summer of 1946 and, concurrently therewith, appellants entered into a contract for the transportation service required for the delivery of the new automobiles. The contract between appellants was filed with the Commission as required by its rules.[4] Before the commencement of the motor carrier operation in 1946 Auto Transports, Inc., filed with the Commission and published as required by the Act a schedule of minimum rates and charges actually maintained and charged.[5] At that time the aforesaid contract contained rates and charges which were the same as the rates and charges contained in the schedule of minimum rates and charges. The minimum rate schedule has been neither modified nor revised. The contract, on the other hand, has been amended from time to time to provide for necessary increases in the rates and charges of appellant Auto Transports, Inc. These contract amendments were filed by said appellant with the Commission in accordance with its regulations in connection therewith, that is,

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3 A permit was duly issued by the Interstate Commerce Commission on August 27, 1947, following temporary authority granted July 12, 1946. Title 49, U. S. C., Secs. 309 and 310.

4 This rule is contained in Appendix D hereto.

5 This requirement is contained in Section 318 (a) of the act, the text of which is set forth in Appendix B hereto.

within 20 days after the effective date of each such contract amendment (Appendix D).

Amendments to appellants' contract were not questioned by the Commission until November 1, 1948. An amendment filed then was questioned by the Director of the Bureau of Motor Carriers of the Commission because it reflected rates higher than the rates contained in the published schedule of minimum rates. The Director informed appellants by letter that in situations where only one shipper is served by a contract carrier, the rates and charges should be the same in both the contract and the published minimum rate schedule. Thereafter, on November 1, 1949, the Commission issued against Auto Transports, Inc., an order to show cause, within 30 days, why its permit should not be suspended because of violation of the contract carrier minimum rate section of the Act [Section 318 (a)]. Appellant Auto Transports, Inc., timely answered the show cause order, and the report and order of Division 5 of the Commission dated May 17, 1950, suspending complainant's "right to engage in transportation" was entered. This is the order which was sustained by the majority in the district court and which is here under attack. Petitions filed with the Commission by appellants, seeking reconsideration of the order, were denied.

The procedure, under which the Commission's order issued, is allowed by the second proviso of Section 312 (a) of the Act. While there is no procedural question here in issue under Section 312 (a), the authority of the Commission to issue the order is challenged.

ARGUMENT.

In their motion to affirm, appellees simply conclude that the appeal presents no substantial question and, in the circumstances, the judgment of the district court should be affirmed. This, indeed, is oversimplification, particularly so since the motion seeks to affirm an order of the district court bred out of a basic error of law.

Efforts to explain away the all important separate standards of regulation of contract carriers on the one hand and common carriers on the other, and the private nature of the former, are wholly unsatisfactory in the motion. Moreover, the motion utterly fails, as did the majority in the district court below, to consider the constitutional aspects of the construction placed on section 318 (a) by the Commission.

Appellees also claim that this controversy involves only contract carriers serving a single shipper, which is the situation with appellants. This is an admission by appellees that the order does create a subclassification of contract motor carrier, as urged by appellants.

It is the position of appellants that a very substantial question is presented in this matter. There is a fundamental question of statutory construction not heretofore considered by this court. Next, a question is presented as to the power and authority of the Interstate Commerce Commission to issue the order in question. Finally, there is presented the very substantial effect upon the entire contract carrier industry, and shippers using such carriers, which would result from the interpretation placed on the Act by the Commission and the court below.

It is readily apparent that the Commission's construction of the Act, in effect, creates a subclassification of

contract carriers by motor vehicle, i. e., carriers having a contract with only one shipper, and that there is no authority in the statute under which the Commission could create such a subclassification. Furthermore, the interpretation placed on the Interstate Commerce Act by the Commission in this matter completely destroys the distinction between common carriers and contract carriers which has been so carefully preserved by the Congress in its scheme of regulation of motor carriers, as reflected by Part II of the Interstate Commerce Act (49 U. S. C., Section 301, et seq.).

The only authority possessed by the Commission to establish classifications of carriers is contaned in Sec. 304 (b) of the Act, and such authority has heretofore been exercised. **Classification of Motor Carriers**, 2 M. C. C. 703.

The essence of the litigation is whether or not the Commission and the district court erroneously construed the requirements of Section 318 (a) of the Act in holding that the contract rates and the minimum rates must be exactly the same at all times. Appellants contend that the district court and the Commission so erred. If there was no error, then, plainly, the statute, as construed, is unconstitutional in that it violates the due process of law clause of the Fifth Amendment to the Constitution of the United States.

(a) **The Authority of the Interstate Commerce Commission.**

The authority of the Commission, of course, is circumscribed by the bounds of the Interstate Commerce Act. One question here is whether, in 1940[6], the Congress enlarged that authority by empowering the Commission to require minimum rates and contract rates to be the same.

6 Sections 318 and 320 were amended September 18, 1940.

After a discussion of the Commission's problem in policing rates of contract carriers prior to the 1940 amendment the motion states that it was "impossible" for the Commission to know the lowest charge made by a contract carrier, and that "the Commission was handicapped in carrying out the duty, imposed by Section 318 (a), of determining and prescribing a 'just and reasonable minimum rate or charge' for such carriers."

There is no foundation for these statements by appellees. Section 318 (b) prior to the 1940 amendment, and to the extent here important, reads as follows:

> "Whenever, after hearing upon complaint or its own initiative, the commission finds that any charge of any contract carrier or carriers by motor vehicle, or any rule, regulation, or practice of any such carrier or carriers affecting such charge, or the value of the service thereunder, for the transportation of passengers or property in interstate or foreign commerce, contravenes the policy declared in section 202 (a) of this chapter, **the commission may prescribe such minimum charge, or such rule, regulation, or practice as in its judgment may be necessary or desirable in the public interest and to promote the policy declared in said section.**"[7] (Emphasis added.)

The section was amended in 1940 to read as follows:

> "Whenever, after hearing, upon complaint or upon its own initiative, the Commission finds that any minimum rate or charge of any contract carrier by motor vehicle, or any rule, regulation, or practice of any such carrier affecting such minimum rate or charge, or the value of the service thereunder, for the transportation of passengers or property or in connection therewith, contravenes the national trans-

7 49 Stat. L. 561.

> portation policy declared in this Act, or is in contravention of any provision of this part, **the Commission may prescribe such just and reasonable minimum rate or charge, or such rule, regulation, or practice as in its judgment may be necessary or desirable in the public interest and to promote such policy and will not be in contravention of any provision of this part.**"[8] (Emphasis added.)

Section 318 (b) as amended in 1940 did not enlarge the power of the Commission to investigate and prescribe reasonable minimum rates or charges for contract carriers. The Commission already had that power. It follows then that contrary to the statement in the motion, the Commission was not handicapped in its power to police or prescribe rates and charges of contract carriers. What, then, did the 1940 amendment do? Essentially, the 1940 amendment specifically, in Section 318 (a), requires contract carriers to maintain "reasonable minimum rates"; the Commission always had authority to require the contract motor carriers to do just that.

Significantly, the Commission, in its 63rd Annual Report to the Congress, dated November 1, 1949, recited its authority in this manner:

> "As to contract carriers, our power is limited to the prescription of reasonable minimum rates" (p. 61).

In support of the position that the Commission was handicapped prior to the 1940 amendment and that its authority was enlarged thereby, the motion cites **Cast Iron Pipe, Pennsylvania Points to New England,** 27 M. C. C. 737 (1941). The cited case certainly lends no support for the statement that the Commission was handicapped in regulating the rates and charges of contract carriers prior to

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[8] 54 Stat. L. 925.

the 1940 amendment. In the cited case the Commission approved certain new minimum rates proposed by a contract carrier and in doing so made the following significant statement:

> "Under Section 318 (a) of the Interstate Commerce Act, it is the duty of the contract carrier by motor vehicle to establish and observe reasonable minimum rates and charges" (p. 739).

Indeed, that case supports appellants' contention as the language used by the Commission above indicates.

The motion takes the further position that an alleged additional infirmity existed in the Act prior to the 1940 amendment in that common carriers were unable to determine the true character of competition by contract carriers. This allegation, of course, is gratuitous speculation, but even if true the Commission under its powers prior to the 1940 amendment, and particularly under Section 318 (b), could have remedied such a situation. Instead of meeting any such situation under its then existing powers, the Commission elected to sponsor legislation to correct this alleged but non-existing infirmity. In doing so, it is important to note that the Commission supplied the phrase "actually maintained and charged," which was inserted in Section 318 (a) by the Congress. However, the Congress apparently recognizing the significance of its action so amended Section 318 (a) by requiring that the minimum rates or charges contained in the schedule to be published must henceforth be "reasonable" minimum rates in contradistinction to rates the Commission had previously permitted contract carriers to publish, which rates had "never been and never will be charged." The important change in the 1940 amendment, and it is overlooked by appellees and the majority opinion in the court below, is the change in Section 318 (a) which simply required minimum rates and charges to be **reasonable.**

The Congress did not change the prohibitory parts of Section 318 (a), namely, those parts which preclude any reductions in the schedule of minimum rates except in compliance with the terms of the section, and the language which bars a contract carrier from demanding, charging or collecting "a less compensation for such transportation than the charges filed in accordance with" Section 318 (a).

The authority of the Commission was not enlarged by the 1940 amendment; the amendment did require the contract carrier to maintain "reasonable" rates.

Appellees' principal basis for its interpretation of Section 318 (a), as amended, as appears at pages five, et seq. of the motion to affirm, is what the motion sees fit to term the "legislative history" of the amendment, as reflected by a letter addressed by the Chairman of the Commission to the Chairman of the Senate Committee on Interstate Commerce and the Chairman of the House Committee on Interstate and Foreign Commerce, quoted in part as a footnote at page eight of the motion. We respectfully present that such letter, given all the weight to which it is entitled, does not support appellees' position and that the conclusion cannot be drawn that Congress, by the amendment requiring publication, in the future, of a schedule containing "reasonable" rates intended that the published rates and rates contained in subsequent amendments to contracts must be identical. As is to be seen from said leter, it is based upon the fact that prior to the 1940 amendment contract carriers could file schedules containing "fictitious" charges "which never have been and never will be charged." Such is not the situation in the case at bar; the published minimum rates are admittedly reasonable, have been charged, and at no time have rates less than the published rates been charged.

On the question of legislative history it is respectfully presented that the views of Congress itself with respect

to legislation enacted by it are entitled to more weight than a communication from an administrative agency while proposed legislation was in formative stages. Thus, if Congressional interpretation of the 1940 amendment was such that, at all times, published minimum rates of contract carriers should be actual rates charged, and if such had been the intent of Congress in enacting the amendment to Section 318 (a), no further legislation would be indicated. It is extremely significant, however, that a bill has recently been introduced in the Senate of the United States, jointly sponsored by three distinguished members of the Senate Committee on Interstate and Foreign Commerce, to further amend Section 318 (a) by, among other things, elision therefrom of the word "minimum". The bill, being Senate Bill S.2752,[9] is captioned "A Bill to Require the Establishment of Actual Rates by Contract Carriers." Thus, obviously, the Congress construes its own legislation as it now stands as being subject to the interpretation placed thereon by appellants and that the interpretation thereof by appellees, as reflected by the motion to affirm, is untenable. It is believed, at least in some quarters, that Senate Bill 2752 was introduced in anticipation of the ultimate outcome of this litigation.

(b) **Appellee's Interpretation of the Act Erroneous.**

The Commission's decision, and that of the majority in the court below, is based solely on the language of the second sentence of Section 318 (a) of the Act. That sentence reads as follows:

> "It shall be the duty of every contract carrier by motor vehicle to file with the Commission schedules containing **the minimum rates or charges of such carrier actually maintained and charged** for the trans-

[9] That portion of Senate Bill 2752 referring to Section 218 (a) of the Interstate Commerce Act, as amended [Title 49, U. S. Code, Section 318 (a)], is attached hereto as Appendix F.

portation of passengers or property in interstate or foreign commerce, and any rule, regulation or practice affecting such rates or charges and the value of the services thereunder." (Emphasis added.)

To remove this sentence from context and to undertake to justify it as the keystone of the regulation, as does the motion to affirm, completely ignores other very significant and equally applicable provisions of the Act and of the same section thereof. Indeed, the interpretation placed on this very sentence by the Commisison and the majority in the court below is not in accord with the manifest intent of the sentence. For example, the sentence merely requires that the carrier file and publish a schedule of **minimum** rates or charges.[10] Other important requirements in the section are: (1) no reduction shall be made in the minimum rates except on 30 days' notice (subject to a suspension procedure which could delay the effective date even longer), and (2) the prohibition against charging less compensation than provided for by the minimum. The sentence cannot be construed to require the publication of a schedule of minimum rates or charges which is identical with contract rates or charges, which may be in excess of such minima, but such construction constitutes the sole predicate for the order of the Commission and the opinion of the majority of the court below, here attacked.

Such construction is directly opposite to the Commission's own expressed understanding as to its power with respect to contract carriers. In 1942, two years after the effective date of the amended Section 318 (a) here in issue, the Commission in **Wyoming Points to Missoula, Montana,** 32 M. C. C. 453, made this significant statement:

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10 The phrase "actually maintained and charged" in Section 318 (a), on which appellees bottom their case, is at best of nebulous meaning as here used. Appellant, Auto Transports, Inc., nevertheless, and there is no dispute on the fact, has actually charged its minimum rates and has always maintained them.

"The minimum rates of contract carriers are, in fact, not rates at all in the common carrier sense of the word. They are, simply, a floor for the charges actually to be made" (p. 455).

Such statements by the Commission as to its understanding of its authority under Section 318 (a) and the requirements of the Section as applied to minimum rates of contract carriers, when compared to the position assumed in this case discloses a glaring inconsistency. But this inconsistency, it must be urged, is not confined to the Commission's administrative decisions. There is now extant the decision of the majority in the court below upholding the Commission on this point, and a decision by the Supreme Court of Pennsylvania upholding appellants' position. **Betterman v. American Stores**, 80 A (2) 66, certiorari denied by this court October 8, 1951, Case No. 190, 96 L. Ed. 32.

The reference to the **Betterman** case in the Motion to Affirm (page 9, footnote 15), while purporting to describe the issues in that case, leaves a limited impression as to the issues before the Pennsylvania Supreme Court in that case. The **Betterman** case involved not only a question under the Pennsylvania statute as to the right of a contract carrier to collect charges in excess of charges contained in its minimum rate schedule filed with the Pennsylvania regulatory body, but that case also contained the same question as to interstate shipments. The Supreme Court of Pennsylvania held that the contract carrier legally could charge a shipper rates higher than the rates contained in the schedule of minimum rates and charges on file with both the State and Federal Commissions. In that case the Supreme Court of Pennsylvania said (at page 72):

"Defendant makes the same legal contention with respect to the rates filed with the Interstate Commerce

> Commission that it made with respect to those filed with the Public Utility Commission of Pennsylvania, namely, that they were the only charges or rates which could legally be collected. Regardless of any technical violation by plaintiff of the Interstate Commerce Act, the present suit of the **plaintiff does not violate the public policy expressed by said act since plaintiff is making no attempt to collect less than the minimum rates on file with the Commission,** but rather to collect the additional compensation guaranteed by his 1937 contract with this defendant and impliedly referred to in their 1939 contract." (Emphasis added.)

It is a fundamental rule of statutory construction that a sentence cannot be lifted from its context in a statute and be given an interpretation not in harmony with the plain intent of the statute of which it is a part. **U. S. v. Amer. Trucking Assn.**, 310 U. S. 534, 544. Stated otherwise, a statute must be viewed in its entirety to determine what the legislature intended to do. We have already referred to the fact that Section 318 (a), in addition to the requirements as to the filing with the Commission of a schedule of minimum rates and charges, has two other very significant provisions. One provides that the contract carrier shall make no reductions in its schedule of minimum rates or charges, except after 30 days' notice subject to certain suspension procedure provided for in Section 318 (c);[11] the other important provision of the section reads as follows:

> "No such carrier shall demand, charge, or collect a less compensation for such transportation than the charges filed in accordance with this paragraph."

Actually, the interpretation of this section by the Commission and as sustained by the majority in the court

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11 Section 318 (c) of the Act empowers the Commission, upon complaint or on its own initiative, to suspend, for a period not to exceed seven months, schedules of minimum rates stating a charge for a new service or a reduced charge in an existing schedule, for the purpose of investigation.

below has the effect of reading out of the section the word "minimum." It requires no argument that an administrative body has no power to change the application of a statute by an administrative determination. **Miller v. United States**, 294 U. S. 435, 441; **Arizona Grocery v. Atchison Ry.**, 284 U. S. 370. The term "minimum" certainly has some significance as used in this section. In his learned and well-reasoned minority opinion in the court below, Judge Vaught summarized this point in the following language:

> "Nowhere in the statute is there any provision that the minimum rate shall be the same as the rate actually charged. If that were the case, why use the word minimum at all? Minimum has a significant meaning, and in this Act the only reasonable construction that can be placed on the word is that it represents the lowest rate which can be charged by the contract carrier, and since the Act provides that no reduction below the minimum rate shall be charged, except under certain conditions, and makes no reference whatever to an increased rate by contract, it is not clear upon what basis or theory the Government contends that the minimum rate and the rate charged by the contract must be the same and in the event a higher rate than the rate by the contract is charged, an additional schedule must be filed setting forth the minimum rate as the rate actually charged by contract.
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> "The contentions are inconsistent. Why provide for a schedule of minimum rates if the only rate to be considered by the Commission is the rate shown in the contract? And, why are contract carrier and shipper protected from the publicity of their actual contract rate if that rate must be the same as the minimum rate which is published and kept open to the public for inspection?"

(c) Statutory Classification of Carriers Ignored By Appellees.

When Congress undertook the regulation of for-hire motor carriers, it recognized two general classes, namely, common carriers and contract carriers, and set up different standards as to the respective classes. For example, in testing the right of a common carrier to operate, proof of "public convenience and necessity" must be available;[12] the contract carrier operation must be "consistent with the public interest and the national transportation policy."[13] Again, different standards govern the respective classes in the publication and application of rates and charges. In the latter respect the common carrier must publish the exact rates for the service it renders and it cannot depart from those rates, nor change them, except upon thirty days' notice subject to suspension procedure.[14] On the other hand, the contract carrier must publish its "reasonable minimum rates" but it is only prohibited from charging **less** compensation than is provided for in such published minimum schedule and must not reduce the rates and charges contained in the schedule except upon thirty days' notice subject to suspension procedure.[15] To bring into clearer focus the divergent statutory requirements on this point, it is important to lay down for comparison the language employed by the Congress to govern the published rates of these respective classes of motor carriers. As to common carriers, Section 317 (b) contains the following language:

> "No common carrier by motor vehicle shall charge or demand or collect or receive a **greater or less or different** compensation for transportation . . . than

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12 Section 307.

13 Section 309.

14 Section 317.

15 Section 318.

> the rates . . . specified in the tariffs in effect at the time." (Emphasis added.)

The comparable portion of Section 318 (a) pertaining to the rate requirements of contract carriers is couched in the following language:

> "No such carrier shall demand, charge, or collect a **less compensation** for such transportation than the charges filed in accordance with this paragraph . . . and it shall be unlawful . . . for any such carrier . . . to charge, accept or receive **less than the minimum charges so filed** . . ." (Emphasis added.)

Thus, the fixed price required for common carrier service is materially different from "reasonable" minimums as to contract carrier service. Under the fixed price interpretation of the Commission, or as may be stated otherwise, the maximum and minimum single rate, appellant, Auto Transports, Inc., would, in effect, be required to follow, in the matter of rates and charges, the same practices required by law of common carriers, to-wit: the publication of **exact** rates rather than **minimum** rates. Such an interpretation completely disregards the different standards which Congress has established for the regulation of the two classes of carriers and fails to recognize the inherent advantages of the contract carrier. That the Commission does not always ignore the different standards is apparent from its opinion in **Petroleum Products, Wyoming Points to Missoula, Mont.**, 32 M. C. C. 453 (1942), where it said:

> ". . . It is significant that, with respect to tariffs of common carriers by motor vehicle, Section 217 (a) authorizes us to 'reject any tariff' not in consonance with that section and with regulations issued thereunder, but no such express authority exists with respect to schedules of contract carriers. This is another illustration of the difference in treatment ac-

corded by Congress as between common carriers and contract carriers by motor vehicle" (p. 456).

Earlier in the same opinion the Commission announced the very principle for which appellants are here contending:

> "A contract carrier's minimum rates, unlike common-carrier rates, do not represent a stated price for which a shipper can demand service. **The minimum rates of contract carriers are, in fact, not rates at all in the common-carrier sense of the term. They are simply a floor for the charges actually to be made**" (p. 455). (Emphasis added.)

Certainly it was not the legislative intent to destroy any inherent advantages of contract carriers; indeed, it is declared to be the national transportation policy that all modes of transportation be so regulated "as to recognize and preserve the inherent advantages of each."[16] Among such inherent advantages, as recognized by the Commission (1 M. C. C. 628), is the fact that the charges of such carriers "may be called in question only if they are found to fall below a reasonable minimum level." In a later case, **New England M. Rate Bureau, Inc., v. Lewers and McCauley**, 30 M. C. C. 651 (1941), the Commission quoted the above decision relating to that inherent advantage and went on to say:

> "The Congress intended that the minimum charges prescribed should not discourage the free movement of traffic by contract carriers" (p. 664).

In appellees' motion a number of the Commission's decisions are cited supporting the Commission's interpretation.[17] Conversely, the language in the **Petroleum** case,

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16 54 Stat. L. 899.

17 28 M. C. C. 75, 76; 32 M. C. C. 273, 287; 41 M. C. C. 527, 528; 30 M. C. C. 229, 231; 32 M. C. C. 453.

particularly (32 M. C. C. 453), supports appellants' position. In any event, there is nothing in those cases that can change the basic law from which this dispute stems. To the extent such decisions appear so to do they are clearly erroneous.

Appellees also cite in support of their position an unreported case where the Commission obtained an injunction prohibiting a contract carrier from charging contract rates differing from minimum rates contained in that carrier's published schedule of minimum rates.[18] The decree in that case was a consent decree based on a stipulation of law and fact and there is no indication that the issues presented in the case at bar were considered by that court.

The motion to affirm lends considerable stress to the proposition that appellants are principally concerned with maintaining the "secrecy" of their contract. The motion states that appellants actually desire the privilege of a **pro forma** compliance in the filing of its initial schedule of minimum rates and charges and thereafter be free "to fix minimum rates, to prefer and discriminate in secrecy completely outside the knowledge of its competitors." This, appellants submit, is not so; it is an assumption of fact, not supported by the record in this matter. Moreover, appellees improperly inject such point in the proceeding since they concede the reasonableness of the minimum rates of appellant, Auto Transports, Inc. (R. p. 117).

A transaction between a shipper and a common carrier is subject to a bill of lading contract. Title 49, U. S. C., Secs. 20 (11) and 319. Such a contract is made for each transaction and the rates contained in such contracts must conform to tariff rates—that is, must be no "greater or

[18] Interstate Commerce Commission v. John A. Ralston, Doing Business as Ralston Transport Company, No. 2780, in the District Court of the United States for the Southern District of Ohio, Eastern Division.

less or different" [Section 317 (b)]. On the other hand, when a shipper and a contract carrier agree on a transportation service, the regulations of the Commission impose specific obligations on both parties as to a series of shipments over a period of time (Appendix D). Pursuant to the provisions of Section 320 (a) of the Act and the Commission's regulations (Appendices B and D), the latter contracts are filed with the Commission but the Act provides they shall not be made public except in connection with a formal proceeding where it considers such disclosure as being consistent with the public interest. The proviso to Section 320 (a), however, enables the Commission to make public provisions of any such contracts which "fails to conform to the published schedule of the contract carrier by motor vehicle as required by Section 318 (a):" In other words, the standard against which the contract is to be measured are the provisions of Section 318 (a).[19] What is the standard of Section 318 (a) to which a contract must conform? In easily understood language the standard is expressed by the Congress to be—

> "No such carrier shall demand, charge, or collect a **less compensation** for such transportation than the charges filed in accordance with this paragraph . . ." (Emphasis added).

Charges filed in accordance with Section 318 (a) are minimums. It follows then that a contract charge which is no less than the minimum is valid, that is, it conforms[20] to the requirements of the standard of Section 318 (a).

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19 Appellees' description is that "the provisions of Section 218 (a) are paramount and must override the qualified and conditional privilege of secrecy contained in Section 220 (a)" (Motion, p. 10).

20 "Conform" in Section 320 (a) does not mean identical; the quoted language from the statute can leave no other conclusion. The bill of lading contract of a common carrier, on the other nand, is always issued subject to such carrier's published tariffs filed with the Commission; as to the common carrier, then, the bill of lading contract must be identical with the tariffs to conform.

Under such circumstances, Section 320 (a) preserves to the contract carrier and its shipper the privilege of the confidence of the contract filed with the Commission.

Appellees deny that the interpretation given by the Commission would destroy the distinction in rate regulation between common and contract carriers and give the following illustrations which purport to show that the distinction in regulation is preserved under this order: The contract carrier may (1) pick and choose its customers; (2) discriminate between customers; (3) "its charges may be called in question only if they fall below a reasonable minimum level"; (4) contract freely with its customers; (5) negotiate its rates with its customers provided that "the rate actually maintained and charged" be the same as the minimum; and, (6) the contract carrier does not have to "adhere to published rates as is required of common carriers." Examination of the six categories describing distinctions will disclose that only numbers (3) and (6) are actually concerned with rate regulations, and that both of these categories, or distinctions, precisely represent the position of appellants. In categories (4) and (5), i. e., contract carriers may contract freely with their customers and negotiate rates with their customers, so long as they are the same as the minimum, do not stand up if categories (3) and (6) are correct. Of course, a contract carrier may pick and choose its customers as set forth in category (1), but there is some question under the Commission's interpretation that it may discriminate between its customers as alleged in category (2).

These illustrations are not helpful to appellees; rather, they support appellants' position. Nevertheless, it is manifest the Commission's order would, in fact, destroy the distinct classification of common and contract carriers. The Commission cannot require contract carriers to submit to rate regulations similar to that required for com-

mon carriers in the absence of legislation repealing the carefully drawn separate statutory regulations for each class of motor carrier. Compare **Trade Commission v. A. P. W. Paper Co.**, 328 U. S. 193, 202.

(d) The Substantial Question.

In support of the proposition that the case does not contain a substantial question, appellees state that there is no foundation for the contention that the operations of all contract carriers are affected by the Commission's order here under attack. Appellees claim that only the contract carrier with a single shipper would be affected (Rec. p. 107). This, of course, is an admission by appellees that the order here attacked actually creates a subclassification of contract carrier not sanctioned by law. To illustrate, assume that a contract carrier has a contract with three shippers, each of which contracts covers the same commodity. Under the construction of Section 318 (a) insisted upon by appellees one of those shippers would be required to contract for rates exactly the same as the minimum rates contained in the published schedule. As to the other two shippers, the contract carrier could contract for any price in excess of the minimum rate. The latter two shippers and the contract carrier could adjust their rates at will so long as they go no lower than the minimum, and provided further that within twenty days after the effective date of any contract rate adjustment the amended contract is filed with the Commission. The third shipper, however, would not enjoy that freedom of contract but would be required in every instance to submit his contractual arrangement to the administrative procedure and its attendant delays.

Assume, further, two contract carriers serving a shipper with one of such carriers having contracts with several other shippers. The carrier with multiple contracts could

make rate adjustments with its shippers, except one, so long as the adjustments were equal to or higher than the minimum rates contained in the published schedule. The contract carrier serving the single shipper would be unable to adjust his rates except after the completion of the administrative procedure. These illustrations lend emphasis to the incongruity of the construction being placed upon this statute by appellees. In the case of the contract carrier with a single shipper, the delays in contract rate adjustments which would flow from appellees' construction of this statute could have irreparable, if not ruinous, financial results.

Appellees give three examples to illustrate their conception of the practical operation of the Commission's interpretation. First, there is the contract carrier with a single shipper and a single commodity to be transported. Next, is the contract carrier with a single shipper but with three different commodities to be transported. The final illustration concerns a contract carrier with three shippers and three different commodities to be transported. In each example a schedule of minimum rates for each commodity must be filed with the Commission. Of course, in each illustration the contract with the shipper must be filed with the Commission; but appellees wrongfully infer that as to each commodity the contract rate and the minimum rate in the published schedule must be the same. The wrongful inference is continued by appellees when they point out as to each commodity a "contract amendment (which), decreases the minimum rate" on either of the commodities, would require the minimum rate in the schedule to be correspondingly reduced. The basic error in this is that there is no requirement that the contract carrier and its shipper contract as to minimums. But the enlightening fact in these examples is that they disclose the general effect of the construction placed on Section 318 (a) by appellees although earlier they claimed that

there was no substantial question because the order affected only those contract carriers serving a single shipper. Thus, it is plain under appellees' conception of the law the word "minimum" in the statute is meaningless; and, moreover, appellees' examples demonstrate the general importance and substantial nature of the question here presented.

CONCLUSION.

Appellees claim that appellants' fears in respect of delays, particularly the thirty day publication period, are unfounded and that a complete answer is found in the provisions of Section 318 (a) wherein it is provided that the Commission in its discretion, for good cause shown, may allow minimum rates to become effective on less than thirty days' notice. Appellees point to the fact that the Commission's reputation for reasonableness and fairness indicates that it would not so administer Section 318 (a), in exercising its discretion, so as to destroy the flexibility of contract between a contract motor carrier and a shipper. That contention begs the question. Of course, the Commission has an enviable reputation of being fair and reasonable, but basically this controversy presents a question of law and whether or not the Commission is authorized to issue the order here attacked. Appellants claim it is not.

The Commission's order not only disregards the separate and distinct standards of rate regulation as between contract carriers and common carriers, but it goes further in creating a sub-classification of contract carriers not contemplated by the act. The district court did not, as appellees contend, give an entirely adequate and satisfactory answer to these points. The majority opinion in the district court concluded that "the contract rate must be the reasonable minimum schedule rate, or vice versa"

(101 F. Supp., p. 135). The court erred, as a matter of law, when it so concluded. Moreover, the court below has not answered the proposition of different standards of regulation nor has it met the proposition of sub-classification of contract carriers.

Every statute should be construed, if at all possible, to preserve its constitutionality. **United States v. Powers,** 307 U. S. 214, 217. Appellants maintain that Section 318 (a) may be so construed; however, if the district court has correctly construed this statute, then the statute, in the circumstances, is unconstitutional since it vitiates the very basis of due process of law. Amendment 5, Constitution of the United States. The district court and appellees herein have not answered appellants' arguments on the constitutional question; the court below erred when it upheld the Commission's interpretation of the statute and then failed to rule on the constitutional question which was before it.

On the question of interpretation, **United States v. Sullivan,** 332 U. S. 689, is apposite. There the Court said at pages 693-4:

> "A restrictive interpretation should not be given a statute merely because Congress has chosen to depart from custom or because giving effect to the express language employed by Congress might require a court to face a constitutional question. And none of the foregoing cases, nor any other on which they relied, authorizes a court in interpreting a statute to depart from its clear meaning. When it is reasonably plain that Congress meant its Act to prohibit certain conduct, no one of the above references justifies a distortion of the congressional purpose, not even if the clearly correct purpose makes marked deviations from custom or leads inevitably to a holding of constitutional invalidity. Although criminal statutes must be

> so precise and unambiguous that the ordinary person can know how to avoid unlawful conduct, see **Kraus & Bros., Inc., v. United States**, 327 U. S. 614, 621-622, even in determining whether such statutes meet that test, they should be given their fair meaning in accord with the evident intent of Congress. **United States v. Raynor**, 302 U. S. 540, 552."

The Interstate Commerce Act is a remedial statute and should be liberally construed in order that its purposes be carried out. The Interstate Commerce Commission has the duty of carrying out these purposes. In fact, the national transportation policy of the Congress specifically admonishes the Commission to administer and enforce the Act with the view of carrying out the policy announced, to-wit: "to provide for fair and impartial regulation of all modes of transportation." The manifest intent of Congress in the Interstate Commerce Act is clear and that the arrangement in respect of transportation between appellants meets all the tests of the statute is plain. This was emphatically stressed by Judge Vaught in his dissenting opinion in the court below. Judge Vaught summarized the situation in the following succinct manner:

> "In summing up the situation, therefore, it is apparent that the first requirement by Congress was that the plaintiff should obtain a permit, which it did; second, that it should establish and observe reasonable minimum rates and charges, which it did; third, that it should file with the Commission, publish and keep open for public inspection a schedule of minimum rates and charges, which it did; and, fourth, that it file with the Commission its contract with its shipper in order that the Commission might know the rates which the plaintiff was, in fact, charging, which contract was not open to public inspection, and this the plaintiff did."

The question here is substantial for it affects not only appellants, but every other contract carrier and its shipper whose operations are subject to Part II of the Interstate Commerce Act. Although its opinions are entitled to respect here, a basic error of law has been committed by the Interstate Commerce Commission, which would be perpetuated by the district court. The position of the Commission in this case is not compatible with its own rules (Appendices C and D) nor with its expressed opinion in other matters hereinabove cited. There certainly is no settled interpretation here even as to the Commission itself. Compare **United States v. Mo. Pac. R. Co.**, 278 U. S. 269, 281; **Order of Conductors v. Swan**, 329 U. S. 520, 525. It is imperative, therefore, that the matter be decided by the United States Supreme Court.

The motion to affirm should be denied.

Respectfully submitted,

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APPENDIX A.

Section 318 (a). **Schedules of Contract Carriers by Motor Vehicle:**

"It shall be the duty of every contract carrier by motor vehicle to establish and observe reasonable minimum rates and charges for any service rendered or to be rendered in the transportation of passengers or property or in connection therewith, and to establish and observe reasonable regulations and practices to be applied in connection with said reasonable minimum rates, fares, and charges. It shall be the duty of every contract carrier by motor vehicle to file with the Commission, publish, and keep open for public inspection, in the form and manner prescribed by the Commission, schedules containing the minimum rates or charges of such carrier actually maintained and charged for the transportation of passengers or property in interstate or foreign commerce, and any rule, regulation, or practice affecting such rates or charges and the value of the service thereunder. No such contract carrier, unless otherwise provided by this chapter, shall engage in the transportation of passengers or property in interstate or foreign commerce unless the minimum charges for such transportation by said carrier have been published, filed, and posted in accordance with the provisions of this chapter. No reduction shall be made in any such charge either directly or by means of any change in any rule, regulation, or practice affecting such charge or the value of service thereunder, except after thirty days' notice of the proposed change filed in the aforesaid form and manner; but the Commission may, in its discretion and for good cause shown, allow such change upon less notice, or modify the requirements of this paragraph with respect to posting and filing of such sched-

ules, either in particular instances, or by general order applicable to special or peculiar circumstances or conditions. Such notice shall plainly state the change proposed to be made and the time when such change will take effect. No such carrier shall demand, charge, or collect a less compensation for such transportation than the charges filed in accordance with this paragraph, as affected by any rule, regulation, or practice so filed, or as may be prescribed by the Commission from time to time, and it shall be unlawful for any such carrier, by the furnishing of special services, facilities, or privileges, or by any other device whatsoever, to charge, accept, or receive less than the minimum charges so filed or prescribed: **Provided**, That any such carrier or carriers, or any class or group thereof, may apply to the Commission for relief from the provisions of this paragraph, and the Commission may, after hearing, grant such relief to such extent and for such time, and in such manner as in its judgment is consistent with the public interest and the national transportation policy declared in the Interstate Commerce Act."

APPENDIX B.

Section 320 (a). **Accounts, Records and Reports—(a) Reports to Commission; copies of contracts; publication of information.**

"The Commission is authorized to require annual, periodical, or special reports from all motor carriers, brokers, and lessors (as defined in this section), to prescribe the manner and form in which such reports shall be made, and to require from such carriers, brokers, and lessors specific and full, true, and correct answers to all questions upon which the Commission may deem information to be necessary. Such annual reports shall give an account of the affairs of the carrier, broker or lessor in such form and detail as may be prescribed by the Commission. The Commission may also require any motor carrier or broker to file with it a true copy of any contract, agreement, or arrangement between such carrier and any other carrier or person in relation to any traffic affected by the provisions of this chapter. The Commission shall not, however, make public any contract, agreement, or arrangement between a contract carrier by motor vehicle and a shipper, or any of the terms or conditions thereof, except as a part of the record in a formal proceeding where it considers such action consistent with the public interest: **Provided**, That if it appears from an examination of any such contract that it fails to conform to the published schedule of the contract carrier by motor vehicle as required by Section 318 (a) of this title, the Commission may, in its discretion, make public such of the provisions of the contract as the Commission considers necessary to disclose such failure and the extent thereof."

APPENDIX C.

CODE OF FEDERAL REGULATIONS.

(1949 Edition.)

Title 49—Transportation.

Part 187—Freight Rate Tariffs, Schedules, and Classifications.

Contract Carrier Schedules.

"Section 187.0. **Schedules defined.**

* * * * * * * *

"(b) The term 'schedule' means a publication stating the minimum rates and charges of a contract carrier, and all rules which it applies in connection therewith."

* * * * * * * *

"Section 187.8. **Form and contents of schedules.**

* * * * * * * *

"(b) **Required notice.** Unless otherwise authorized by the Commission, all schedules of minimum rates or charges and supplements thereto shall be filed and posted at least 30 days prior to the effective date thereof.

* * * * * * * *

"(p) **Tables of minimum rates or charges.** (1) The tables of minimum rates or charges shall be shown immediately following the rules, and shall state minimum rates or charges actually maintained and charged.

* * * * * * * *

"(r) **Schedules covering new services.**

* * * * * * * *

"(2) The actual or proposed contract or amendment to a contract, filed in accordance with the provisions of this paragraph, shall show the actual rates and charges for the services to be performed thereunder."

(Part 187 provides separate regulations for Common Carrier Freight Tariffs and Classifications.)

APPENDIX D.

CODE OF FEDERAL REGULATIONS.

(1949 Edition.)

Title 49—Transportation.

Part 173—Contracts for Transportation of Property.

"Sec. 173.1—**Filing of Contracts for transportation of property.**

"(a) All contract carriers of property by motor vehicle, as defined in Section 203 (a) (15) of Part II of the Interstate Commerce Act, shall on or before July 15, 1937, file with the Commission at its office in Washington, D. C., a true copy of each and every contract for transportation of property existing and in force on said date, and within 20 days after the date any subsequent contract for transportation of property is entered into a true copy thereof, all of which shall contain the charges of such contract carriers for the transportation of property in interstate or foreign commerce, and any rule, regulation, or practice affecting such charges and the value of the services thereunder."

"Sec. 173.2—**Contracts or agreements to be in writing.**

"(a) All contract carriers by motor vehicle, as defined in Section 203 (a) (15) of the said Act, shall cease and desist on or before July 1, 1937, from transporting property for hire in interstate or foreign commerce except under special and individual contracts or agreements which shall be in writing, shall provide for transportation for a particular shipper or shippers, shall be bilateral and impose specific obligations upon both carrier and shipper

or shippers, shall cover a series of shipments during a stated period of time in contrast to contracts of carriage governing individual shipments, and copies of which contracts or agreements shall be preserved by the carriers parties thereto so long as such contracts or agreements [are] in force and for at least one year thereafter."

[Note—A modification of this rule, effective December 17, 1951, is of no consequence here (16 F. R. 11605).]

APPENDIX E.

Sec. 318 (b)—Complaints and Investigations; hearings and orders of the Commission.

"Whenever, after hearing, upon complaint or upon its own initiative, the Commission finds that any minimum rate or charge of any contract carrier by motor vehicle, or any rule, regulation, or practice of any such carrier affecting such minimum rate or charge, or the value of the service thereunder, for the transportation of passengers or property or in connection therewith, contravenes the national transportation policy, declared in the Interstate Commerce Act, or is in contravention of any provision of this chapter, the Commission may prescribe such just and reasonable minimum rate or charge, or such rule, regulation, or practice as in its judgment may be necessary or desirable in the public interest and to promote such policy and will not be in contravention of any provision of this chapter. Such minimum rate or charge, or such rule, regulation, or practice, so prescribed by the Commission, shall give no advantage or preference to any such carrier in competition with any common carrier by motor vehicle subject to this chapter, which the Commission may find to be undue or inconsistent with the public interest and the national transportation policy declared in the Interstate Commerce Act, and the Commission shall give due consideration to the cost of the services rendered by such carriers, and to the effect of such minimum rate or charge, or such rule, regulation, or practice, upon the movement of traffic by such carriers. All complaints shall state fully the facts complained of and the reasons for such complaint and shall be made under oath."

APPENDIX F.

82d Congress

2d Session

S. 2752

IN THE SENATE OF THE UNITED STATES.

February 27 (legislative day, February 25), 1952.

Mr. Bricker (for himself, Mr. O'Conor, and Mr. Capehart) introduced the following bill; which was read twice and referred to the Committee on Interstate and Foreign Commerce.

A BILL

To require the establishment of actual rates by contract carriers.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That subsection (a) of section 218 of the Interstate Commerce Act, as amended is hereby amended by—

(a) inserting the words "just and" before the word "reasonable" where it first appears in the first sentence of the subsection;

(b) striking the word "minimum" wherever it appears in the subsection;

(c) striking the word "reduction" from the fourth sentence of the subsection and inserting in lieu thereof the word "change"; and

(d) inserting the words "more or" before the word "less" wherever it appears in the sixth sentence of the subsection.

Sec. 2. Subsection (b) of section 218 of the Interstate Commerce Act, as amended, is hereby amended to read as follows:

"(b) Whenever, after hearing, upon complaint or upon its own initiative, the Commission finds that any rate or charge of any contract carrier by motor vehicle, or any rule, regulation, or practice of any such carrier affecting such rate or charge, or the value of the service thereunder, for the transportation of passengers or property or in connection herewith, contravenes the national transportation policy declared in this Act, or is in contravention of any provision of this part, the Commission may prescribe such just and reasonable rate or charge, or maximum and minimum or maximum rate or charge, or such rule, regulation, or practice as in its judgment may be necessary or desirable in the public interest and to promote such policy and will not be in contravention of any provision of this part. Such rate or charge, or such rule, regulation, or practice, so prescribed by the Commission, shall give no advantage or preference to any such contract carrier in competition with any common carrier subject to this Act, which the Commission may find to be undue or inconsistent with the public interest and the national transportation policy declared in this Act, and the Commission shall give due consideration to the cost of the services rendered by such contract carriers, and to the effect of such rate or charge, or such rule, regulation, or practice, upon the movement of traffic by such contract carriers, and by other carriers subject to this Act. All complaints shall state fully the facts complained of and the reasons for such complaint and shall be made under oath."

MAY 9 1952

Supreme Court of the United States

OCTOBER TERM, 1951

No. 68

ALLEGHENY AIRLINES, INC., and
GENERAL MOTORS CORPORATION,
Appellants,
vs.
UNITED STATES OF AMERICA and
INTERSTATE COMMERCE COMMISSION,
Appellees.

PETITION FOR REHEARING

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In The

Supreme Court of the United States

OCTOBER TERM, 1951

No. 665

AUTO TRANSPORTS, INC., and
GENERAL MOTORS CORPORATION,
Appellants,
vs.
UNITED STATES OF AMERICA and the
INTERSTATE COMMERCE COMMISSION,
Appellees

PETITION FOR REHEARING

Appellants, petitioners herein, are much aggrieved by the *per curiam* order of the Court entered in this cause April 21, 1952, granting Appellees motion to affirm, and respectfully petition the Court for rehearing in the sincere belief that, in equity and justice, they are entitled to the relief sought in this petition.

Petitioners realize that this Court is confronted with numerous petitions for rehearing by unsuccessful litigants, but the importance of the question here involved both to the contract carrier section of the entire motor

carrier industry and the innumerable shippers throughout the nation using the services of such carriers, including appellants, compels us to file this petition for rehearing which we earnestly urge the Court to grant.

Petitioners urge that it is the duty of, and within the province of, this Court to review its action in this case which review we feel is imperative for the following reasons:

(1) Because of the conflict between the decision in this case and a prior decision of this Court; and,

(2) Because of the substantial nature of the question* involved demonstrated by the manifestation of interest by contract carriers indicating the nationwide effect of the *per curiam* order.

THE FIRST REASON FOR REHEARING—
PRESENT CONFLICT IN DECISIONS OF THIS COURT

In the case of *Betterman v. American Stores,* 80 A. 2d 66, certiorari denied by this Court October 8, 1951, Case No. 190, 96 L. Ed. 32, the question presented was whether a contract carrier could legally collect from its shipper charges in excess of the rates and charges contained in its minimum rate schedule filed with the Interstate Commerce Commission, under the requirements of Section

*The question presented is—"Whether Title 49, U. S. C., Section 318(a), requires appellant, Auto Transports, Inc., to file with the Interstate Commerce Commission as a schedule of minimum rates or charges the actual contract charges contained in its current contract with appellant, General Motors Corporation, which contract is required to be filed with the Interstate Commerce Commission under the provisions of Title 49, U. S. C., Section 320(a)." (Brief of Appellants in Opposition to Motion to Affirm, p. 3.)

318(a), and a similar schedule filed with the Pennsylvania Public Utility Commission. The Pennsylvania Supreme Court held that the contract carrier could charge and collect from the shipper charges higher than the rates set forth in its schedule of minimum rates and charges on file with both the State Commission and the Interstate Commerce Commission. The Supreme Court of Pennsylvania held (at page 72):

> "Defendant makes the same legal contention with respect to the rates filed with the Interstate Commerce Commission that it made with respect to those filed with the Public Utility Commission of Pennsylvania, namely, that *they were the only charges or rates which could legally be collected.* Regardless of any technical violation by plaintiff of the Interstate Commerce Act, the present suit of the plaintiff does not violate the public policy expressed by said act since plaintiff is making *no attempt to collect less than the minimum rates* on file with the Commission, but rather to collect the *additional compensation guaranteed by his 1937 contract* with this defendant and impliedly referred to in their 1939 contract." (Emphasis added.)

That decision remains extant by reason of the denial of certiorari by this Court on October 8, 1951.

The *per curiam* decision herein affirms an exact opposite interpretation of Section 318(a). The interpretation affirmed* is couched in the following rather equivocal language:

> "It is true that the Commission's order has the effect of construing Section 318 (a) to require a contract carrier to file and publish a schedule of rates and charges which it actually maintains and

*Auto Transports v. United States, 101 F. Supp. 132.

> charges any one shippe nd since Auto has a contract under its permit with only one shipper, *the order has the rather anomalous effect of requiring it to actually charge that shipper the rates filed and published in its schedule.* In other words, the contract rate must be the reasonable minimum scheduled rate or vice versa." (Emphasis added.) (p. 134).

So, under the rule of the *Betterman* case a contract carrier may charge and collect from its shipper rates and charges in excess of the schedule of minimum rates and charges filed with the Commission; in the instant case the rule is that the contract rate charged must be the minimum rate on file with the Commission, a rule in total conflict with the former rule.

Thus, a conflict in the decisions of this Court now exists.

THE SECOND REASON FOR REHEARING— THE SUBSTANTIAL QUESTION DEMONSTRATED BY—

(a) Manifestation of Interest

Since the *per curiam* order a number of other interests have manifested concern with the impact of the Court's order. This manifestation of interest further persuades petitioners to seek rehearing. These interests* have advised petitioners that they will undertake to file an

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*Contract Carrier Conference, American Trucking Associations, Inc., Washington, D. C.
Anchor Motor Freight, Inc., of Delaware, Cleveland, Ohio.
Anchor Motor Freight, Inc., of Michigan, Flint, Michigan.
Anchor Motor Freight, N. Y. Corp., Tarrytown, New York.
W. R. Arthur & Co., Inc., Janesville, Wisconsin.
Complete Auto Transit, Inc., Detroit, Michigan.
Jack Cooper Transport Company, Inc., Kansas City, Missouri.

amicus curiae brief with this Court setting forth their respective positions. At this time petitioners are unable to say that appellees will consent to the filing of such briefs, but petitioners have been assured that failing to obtain consents from appellees, petitions will be filed with this Court by such parties for permission to file such briefs in support of petitioners' position.

(b) Nationwide Importance of the Question Here Involved and Resultant Effects of Decision.

The *per curiam* order in this case affects all of the contract motor carriers operating throughout the United States and all their present and future shippers.

Petitioners believe that the *per curiam* order results from the principal contention in the motion to affirm, namely, that the appeal presents no substantial question. Petitioners undertook to show in their brief in opposition to the motion to affirm that, notwithstanding the contention of appellees, the question presented was substantial and, in fact, its substantiality could even be recognized from the arguments of appellees.

We are advised by members of the staff of the Interstate Commerce Commission that there are approximately 3,000 contract carriers by motor vehicle subject to the Commission's jurisdiction. This litigation affects the administration of the Act as it applies to all of these contract carriers. This is apparent from appllees' motion to affirm, a careful analysis of which is contained in petitioners' brief in opposition to the motion to affirm (pp. 24-26).

The implications of the case are tremendous. If the *per curiam* order is allowed to stand, contract carriers

will be required to observe the same regulation with respect to rates to be charged for transportation services as apply to common carriers by motor vehicle, notwithstanding the fact that under the statute separate and wholly different types of regulation are in effect.

The remainder of this section is illustrative. A contract carrier by motor vehicle is a creature of statute; under common law the nomenclature employed to describe such a carrier was "private carrier." The contractual arrangements between petitioners are of a private nature, and this is recognized by the Act. (Sec. 320(a)). They have entered into a contract under which the transportation service is performed and the carrier-petitioner performs an exclusive transportation service of the same character as if the service were performed by vehicles and employees of the shipper-petitioner. The regulations* of the Interstate Commerce Commission permit adjustments in the contract rates above the minimum rates filed with the Commission without resort to any administrative procedure, so long as modifications of the contract are filed with the Commission within 20 days after they become effective. *This regulation of the Commission would become a nullity under the per curiam order. The freedom to contract between petitioners would come to an end under the same order.*

The carrier-petitioner herein, Auto Transports, Inc., serves the shipper-petitioner General Motors Corporation exclusively in the delivery of new automobiles from a plant at Kansas City, Kansas.

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*Code of Federal Regulations, Title 49, Secs. 173.1-173.6. See Appendix D of Brief of Appellants in Opposition to Motion to Affirm.

Carrier-petitioner has no other source of income.

Shipper-petitioner has no other available means for the delivery of automobiles by motor carrier.

In the circumstances, the flexibility of the contractual relation between the petitioners is vital to their respective operations.

For example, carrier-petitioner may require increases in rates as a result of increased costs of operation in the performance of its contract. With the regulations of the Commission as now interpreted under the *per curiam* order, the shipper-petitioner cannot agree immediately to a rate compensating the carrier for the increased costs.

On the other hand, if for any reason a decrease in the transportation charges is warranted, such as may be the case in a general lowering of costs or in the case of an increased volume of traffic, it would be impossible for the shipper-petitioner to realize such lowered costs in the contractual arrangements without submitting the modification of the contract to the Commission, subject to a procedure which may involve the suspension of the reduced rate for a period of not more than 7 months,* and, with the additional possibility of said reduction being declared unreasonable by the administrative body. Petitioners strongly contend that the Interstate Commerce Act should not be interpreted to put a shipper and its contract carrier in the throes of economic uncertainty.

Conversely, a common carrier has many sources of revenue and shippers who rely upon common carriers ordinarily have a choice of such agencies for transportation service.

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*Procedure in Sec. 313(a). See Code of Fed. Reg., Sec. 187.8(b), (Appendix C in Brief of Appellants in Opposition to Motion to Affirm.)

(c) Purpose of Regulation of Contract Carriers

Apparently the principal purpose of the Congress in regulating contract carriers by motor vehicle was to enable the Commission through its investigative authority to protect common carriers. To illustrate, Section 318(b) of the Act* contains the following sentence:

> "Such minimum rate or charge, or such rule, regulation, or practice, so prescribed by the Commission, shall give no advantage or preference to any such (contract) carrier in competition with any common carrier by motor vehicle subject to this part, which the Commission may find to be undue or inconsistent with the public interest and the national transportation policy * * *"(Interpolation supplied.)

It is clear that this duty of the Commission in connection with the protection of common carriers is concerned only with minimum rates and not contract rates. In a report dealing with this section of the statute the Commission in *Contracts of Contract Carriers,* 1 MCC 628, made the following significant statement:

> "* * * The underlying purpose is plainly to promote and protect adequate and efficient common-carrier service by motor vehicle in the public interest, and the regulation of contract carriers is designed and confined with that end in view. For that reason it differs from the common-carrier regulation.
>
> Thus, we are authorized to prescribe minimum charges for contract carriers, but not maximum

*Quoted in full at Appendix E of Brief of Appellants in Opposition to Motion to Affirm.

> charges. No need exists, as to such carriers, for protecting the public against exorbitant charges, because the contracting shippers are well able to protect their own interests in this respect. The patent object of Congress is to protect the common carriers against cut-throat competition. This appears explicitly in section 218 (b) which enjoins us, in prescribing minimum charges for contract carriers, to 'give no advantage or preference to any such carrier in competition with any common carrier by motor vehicle subject to this part.'"

We hasten to inform the Court that the Commission, in more recent reports, has held that a contract carrier minimum rate is not unlawful even if it be lower than the comparable rate of a common carrier. *Roofing from Elizabeth, New Jersey, to Norwood, Massachusetts,* 51 MCC 258, 261 (1950); and compare *New England M. Rate Bureau, Inc., v. Lewers and McCauley,* 30 MCC 651, 663, 664 (1941). In the latter case the Commission said "that the Congress intended that the minimum charges prescribed should not discourage the free movement of traffic by contract carriers."

There has been no question raised with respect to the reasonableness of the minimum rates of Auto Transports, Inc., but, importantly, insofar as the Commission is concerned, its authority extends only to the regulation of the minimum rate and for the purpose stated in the statute, as the Commission itself recognizes maximum rates of contract carriers are within the sphere of control of the contracting shipper.

In *New Automobiles in Interstate Commerce,* 259 ICC 475, 536 (1945), the Commission after an exhaustive study, and five years after the amendment of Section 318(a)

which is here in controversy, made the following significant statement relative to minimum rates of contract carriers:

> "• • • we were given the power to fix minimum rates 'primarily for the purpose of preventing destructive competition in rates and promoting the financial stability of the transportation agencies.' • • •"

By these tests the *per curiam* order of April 21, 1952, is in error.

(d) Statutory Classification of Motor Carriers Destroyed.

Since the inception of the regulation of motor carriers under Federal legislation, there has been no departure from the clear delineation always heretofore maintained as between regulation as it applies to common carriers by motor vehicle, on the one hand, and contract carriers by motor vehicle, on the other. The manifest intent of the Congress has been to maintain these separate standards of regulation. The order of the Interstate Commerce Commission, which has been affirmed by this Court, is the first deviation from this important legislative distinction. Such deviation by administrative fiat or judicial interpretation is improper. *Miller v. United States,* 294 U. S. 435, 440; *Arizona Grocery v. Atchison Ry.,* 284 U. S. 370, 387.

In order to bring into clearer focus the divergent statutory requirements on this point, the language employed by the Congress to govern the published rates of these respective classes of motor carriers is important. As to common carriers, Section 317(b) contains the following language:

> "No common carrier by motor vehicle shall charge or demand or collect or receive a *greater or less or different* compensation for transportation * * * than the rates * * * specified in the tariffs in effect at the time; * * *" (Emphasis added.)

The comparable portion of Section 318(a) pertaining to the rate requirements of contract carriers is couched in the following language:

> "No such carrier shall demand, charge, or collect a *less compensation* for such transportation than the charges filed in accordance with this paragraph * * * and it shall be unlawful for any such carrier * * * to charge, accept or receive *less than the minimum charges so filed* * * *" (Emphasis added.)

Thus, the fixed price required for common carrier service is materially different from "reasonable" minimums as to contract carrier service. Under the fixed price interpretation of the Commission, as herein applied, or as may be stated otherwise, the maximum and minimum single rate, petitioner, Auto Transports, Inc., would, in effect, be required to follow, in the matter of rates and charges, the same practices required by law of common carriers, to-wit: the publication of *exact* rates rather than *minimum* rates. Such an interpretation completely disregards the different standards which Congress has established for the regulation of the two classes of carriers and fails to recognize the inherent advantages of the contract carrier.

The rate section of the act as it applies to common carriers and the rate section as it applies to contract carriers, both of which are hereinabove set forth to the extent that they are important herein, when reviewed in connection with the Commission's order sustained by the *per curiam*

order herein, leads to no other conclusion but that such order is directly contrary to the clear expressions of these sections.

Section 304(b) of the Act contains the authority for the Commission to establish classifications of carriers but only "as the special nature of services require". This authority has been exercised by the Commission. *Classification of Motor Carriers*, 2 MCC 703. The *per curiam* order. in this case, actually creates a subclassification of carriers not contemplated by this section of the Act.*

CONCLUSION

Under the provisions of Section 320(a) of the Act petitioners have a right to the privacy of their contractual arrangements except in instances, not important here, which allows the Commission to make a disclosure of such contracts. Petitioners are strongly of the opinion that shippers and contract carriers are entitled to the protection of that section. However, this is neither the purpose of this litigation nor a legal issue in this matter. Appellees incorrectly state in their motion to affirm that petitioners wish to "prefer and discriminate in secrecy completely outside the knowledge" of competitors. There is neither factual nor legal basis for that statement.

Petitioners in this litigation merely desire to preserve the flexibility in their contractual arrangements which they believe is guaranteed to them by the statute. Reasons for the necessity of such flexibility have already been set forth hereinabove.

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*See pp. 24-27 Brief of Appellants in Opposition to Motion to Affirm.

Petitioners respectfully submit that the *per curiam* order is in error as a matter of law because it affirms a decision of the court below, sustaining an order of the Interstate Commerce Commission, which cuts through the statutory distinctions between common carriers and contract carriers. Moreover, an important result of the *per curiam* order will require every rate agreement between petitioners to be published subject to the administrative procedure provided for in Part II of the Interstate Commerce Act and with all the attendant delays in connection therewith.

A contract, such as is here involved, contemplates the purchase and sale of transportation, and, because of the private nature of the transaction, is hardly any different than the purchase of livestock by a farmer. A rancher would be in quite a dilemma if in the buying and selling of cattle he were required to enter into transactions whereby necessary delays in the determination of a price, agreed to by the buyer and the seller, depended upon the action of some administrative body.

The regulatory scheme as it applies to contract carriers by motor vehicle is, because of this *per curiam* order and the order in the *Betterman* case, *supra*, in a state of confusion. This confusion has been intensified by the introduction in the United States Senate of a bill* designed to accomplish by an amendment to Section 318(a) what the Commission has accomplished here by interpretation. The proposed legislation discloses that the legislative interpretation of this statute does not conform to the interpretation which heretofore has been given in this proceeding.

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*S. 2752. See pages 12 and 13 of the Brief of Appellants in Opposition to Motion to Affirm and Appendix F thereto.

WHEREFORE, premises considered, petitioners respectfully request the Court to rehear the motion to affirm and assume jurisdiction in order that petitioners may fully demonstrate to the Court the error of the Court below in affirming the order of the Interstate Commerce Commission involved in this case, and postpone issuance of mandate.

Respectfully submitted,

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CERTIFICATE OF COUNSEL

I hereby certify that the foregoing petition for rehearing is presented in good faith and not for delay and in accordance with the requirements of Rule 33 of the rules of this Court.

Walter R. Frizzell,
Counsel for Petitioners.

CERTIFICATE OF SERVICE

I hereby certify that the foregoing petition for rehearing has this day been served upon counsel for the adverse parties.

Walter R. Frizzell,
Counsel for Petitioners.

Dated at Detroit, Michigan,
May 8, 1952.